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No. 88-47

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

ALTON CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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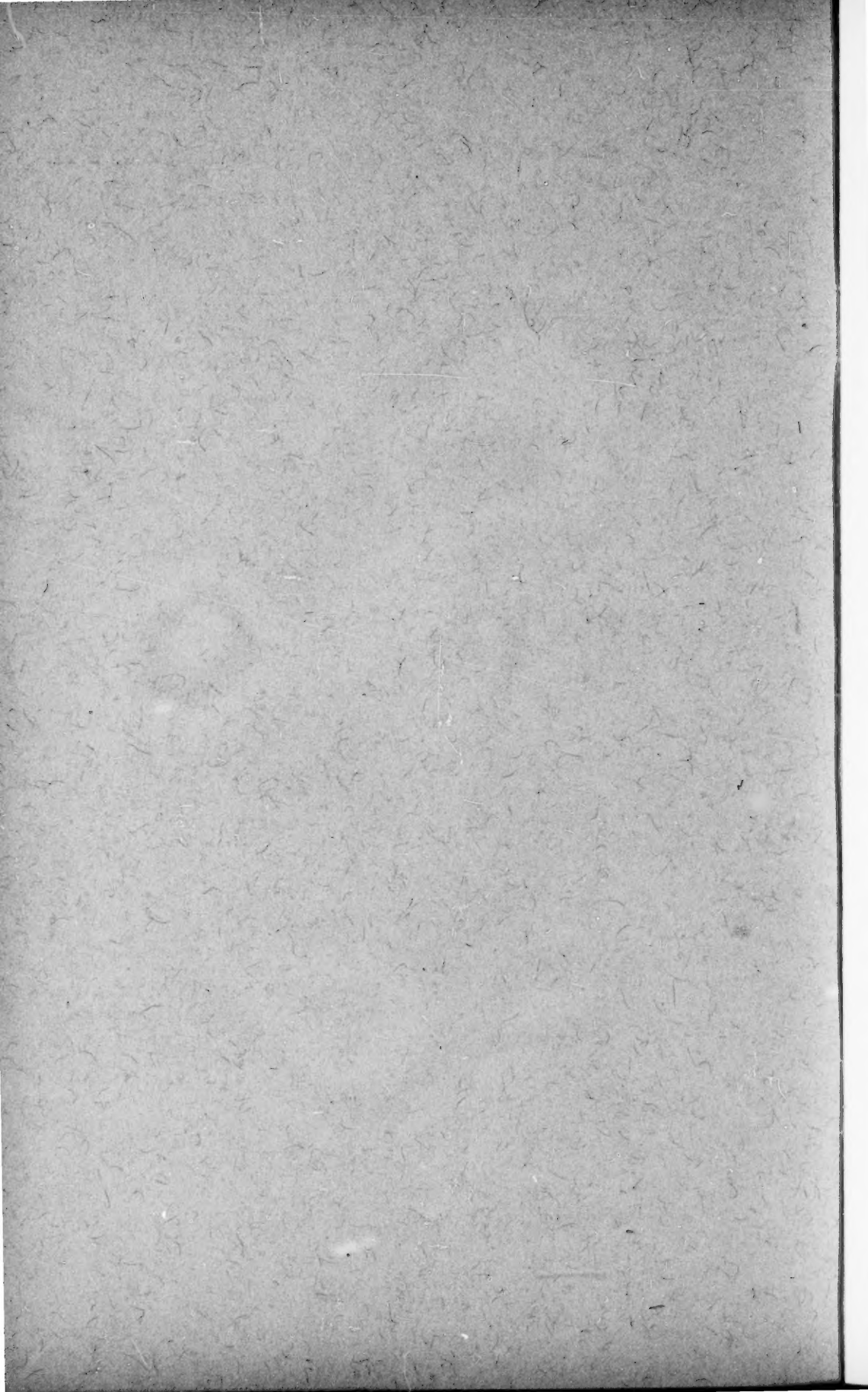
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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in questioning and excusing a juror based on information that the juror's parents-in-law were personally associated with petitioner through their political affiliation.

2. Whether the out-of-court declarations of a co-conspirator were properly admitted at trial under Fed. R. Evid. 801(d)(2)(E).



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 845 F.2d 782.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1988. A petition for rehearing was denied on June 13, 1988. The petition for a writ of certiorari was filed on July 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Arkansas, petitioner was convicted on two counts of purchasing votes, in violation of 42 U.S.C. 1973i(c). Petitioner and two co-defendants were acquitted on one count of conspiracy to purchase votes, in violation of 18 U.S.C. 371, and one count of multiple voting, in violation of 42 U.S.C. 1973i(e). Petitioner was also acquitted on 12 counts of purchasing votes. Petitioner was sentenced to three years' imprisonment and fined \$5,000. The court of appeals affirmed (Pet. App. 1a-11a).

1. Petitioner, a county judge in Newton County, Arkansas, was a candidate for re-election at a general election to be held on November 4, 1986. His co-defendant, Charles Clark, was a candidate for sheriff in the same election, and his other co-defendant, Dennis Holt, was a precinct worker and political supporter of petitioner and Clark. Shortly before the election, petitioner and Clark approached a number of individuals and offered to purchase their votes. With respect to the two counts on which he was convicted, the evidence showed that petitioner personally paid \$50 to one county resident, Pamela Cross, in exchange for her blank absentee ballot and that he paid \$30 to another resident, Penny Ann Carter, in exchange for her absentee vote. Pet. App. 2a, 8a.

At trial, two other voters, Jack Bough and Wanda Bough, testified that Holt paid each of them \$40 to sign absentee voter applications and statements that were needed to obtain absentee ballots (Pet. App. 20a-26a). They also testified that Holt said that he would give the absentee voter statements and ballots to petitioner and that petitioner would finish filling

them out (*id.* at 20a, 24a). Petitioner objected to their testimony on the ground that Holt's statements were not admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), because there was no independent evidence of a conspiracy between himself and Holt (Pet. App. 20a, 25a). Relying on *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978), the district court conditionally admitted the testimony (Pet. App. 21a, 26a). At the close of the government's case, the district court found that the government had proved by a preponderance of the evidence that a vote-buying conspiracy existed, that petitioner and Holt were members of the conspiracy, and that Holt's statements to the Boughs were made during the course and in furtherance of the conspiracy (*id.* at 26a-28a, 29a-31a). The district court accordingly ruled that Holt's statements were admissible under Rule 801(d)(2)(E). The court reaffirmed that ruling at the close of all the evidence (Pet. App. 26a-28a, 29a-31a).

After the second day of trial, an FBI agent received a telephone call from a citizen of Newton County. The caller told the agent that one of the jurors, Robin Noell, was the son-in-law of two citizens of Newton County who were close to petitioner and had worked for him during the election. The caller also advised the agent that Noell had received a culvert, which he had put to personal use, from petitioner through his father-in-law. In addition, according to the FBI agent's records, one of Noell's parents-in-law had picked up an absentee ballot for the election, and the other had picked up more than one ballot and perhaps as many as five. That evening, the FBI agent notified the prosecutor about the call. Pet. App. 2a, 15a.

The next morning, the prosecutor informed the district court about the telephone call received by the FBI agent. The court gave its charge to the jury and the two alternates, but instructed them not to begin deliberations until after the alternates had been excused. The judge then had juror Noell brought to his chambers, where he questioned Noell outside the presence of counsel. Upon completing the questioning, the court excused Noell and one of the alternates and directed the jury to begin deliberations. Pet. App. 2a-3a.

After the jury retired to begin its deliberations, the district judge made a record in open court concerning the removal of Noell from the jury (Pet. App. 14a-19a). In response to the district judge's questions, Noell confirmed that his parents-in-law knew petitioner, but he stated that he did not know whether they had worked for petitioner (*id.* at 15a). Based on his past experience in Newton County, the district judge observed that "they feel very strongly about their politics down there and they also—it's a very small county, very rural county. The Republicans are usually very close to other Republicans, the Democrats are usually very close to other Democrats" (*id.* at 16a). Because the district concluded that that information provided sufficient grounds to excuse Noell, it did not question him about the allegation that he had received a culvert from petitioner through his father-in-law (*id.* at 15a-16a). The court further explained that his questions "tainted that juror and I don't think I have any choice but to go ahead at that point and excuse him" (*id.* at 18a). Petitioner's counsel renewed his objection to the court's decision to question Noell in the first place, but noted "for the record that I agree with the Court that once he spoke

to the jury [sic] he had no choice but to strike him" (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1a-11a). The court held that the district court did not abuse its discretion under Fed. R. Crim. P. 24(c) by questioning juror Noell because "[t]he information provided by [the prosecutor], based upon [the FBI agent's] report and the records, raised a serious question about Noell's impartiality" (Pet. App. 4a-5a). The court of appeals also held that the district court did not abuse its discretion in excusing Noell. The court explained that "Noell confirmed that he was aware his parents-in-law knew [petitioner], and the records mentioned by [the FBI agent and the prosecutor] indicated that Noell's in-laws had worked for [petitioner] during the election" (*id.* at 5a). The court also pointed out that "[t]he district judge also knew that partisan feelings in Newton County ran high" (*ibid.*). It was therefore not an abuse of discretion, the court of appeals held, for the district court to excuse Noell based on its concern that "any of these factors might affect Noell's impartiality" (*ibid.*).

The court of appeals also upheld the admission of Holt's statements to Jack and Wanda Bough under Fed. R. Evid. 801(d)(2)(E) (Pet. App. 10a-11a). Relying on *Bourjaily v. United States*, No. 85-6725 (June 23, 1987), the court noted that the district court had made the required preliminary findings in order to admit Holt's statements under the rule (Pet. App. 10a-11a). The court rejected petitioner's claim that the district court had improperly based its findings of a conspiracy involving both petitioner and Holt solely on Holt's hearsay statements (*ibid.*). The court found that "[n]on-hearsay testimony and documentary evidence was offered to show that [peti-

tioner] and Holt, acting individually, bought absentee voting materials from various persons, including Pamela Cross, Penny Ann Carter, and the Boughs, and that Holt was a precinct worker for [petitioner]" (*id.* at 11a). The court also observed that there was other evidence showing that "[petitioner] and Charles Clark, acting together, negotiated with [two other voters] to purchase their absentee votes and [three] of their relatives * * * for \$50.00 each" and that "[petitioner] later paid [one of those voters] \$250.00 for the five blank absentee ballots" (*ibid.*). The court concluded that that non-hearsay evidence, "[t]ogether with Holt's statements that he would take the voting materials he had purchased from the Boughs to [petitioner] for completion," was sufficient to support the district court's preliminary finding that petitioner and Holt were members of a vote-buying conspiracy (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the district court improperly excused juror Noell solely on the basis of the political affiliation of his parents-in-law. The district court, however, did not excuse juror Noell solely because his parents-in-law were Republicans. Rather, the court based its ruling on the special circumstances of the case: that Noell's in-laws were of the same political party as petitioner and from the same county; that Newton County is a very small county (having a population of less than 8,000); that partisan political feelings run very strong in Newton County; that Republicans in that county are "usually very close to other Republicans"; and that Noell knew that his in-laws knew petitioner. Pet. App. 15a-16a. As the court of appeals explained (*id.* at 6a), the district court's experience with the

strength of partisan feelings in Newton County merely reinforced its concern "that residents of this small rural county and others closely associated with them might be predisposed in their views of the case." Hence, the district court's decision to excuse Noell for possible bias was properly bottomed on his in-laws' association with petitioner, and not merely on their political affiliation with the Republican party.

Petitioner claims (Pet. 10-13) that the decision of the court of appeals conflicts with *United States v. Salamone*, 800 F.2d 1216 (3d Cir. 1986). In fact, there is no conflict between the two decisions. In *Salamone*, the Third Circuit held, in a firearms possession case, that it was improper for the district court to excuse for cause six potential jurors solely because they or members of their family belonged to the National Rifle Association. A finding of bias, the court held, could not properly be based on such group affiliation alone. *Id.* at 1225-1227. The finding of juror bias in this case, however, was not based on group affiliation, but on personal association. For the same reason, there is no merit to petitioner's related claim (Pet. 13-14) that the court of appeals' decision is inconsistent with decisions of this Court holding that "a juror may not be excluded solely on the basis of group affiliations" (*id.* at 13). Thus, a juror may not be excluded simply because he is a member of the Rotary Club or the Chamber of Commerce. But if the Rotary Club or the Chamber of Commerce in a particular community had only ten members and the defendant was one of them, it would be entirely proper for the court to exclude as a juror any other member of those organizations. The exclusion in that case, as in this one, would be based not on group affiliation but on personal association.

In any event, because petitioner objected only to the district court's decision to question Noell (Pet. App. 17a-18a), petitioner has waived any claim that the district court excused Noell for improper reasons. Petitioner specifically agreed that the district court "had no choice but to strike [Noell]" once it "tainted" him by questioning him in chambers (*id.* at 18a). Nor has petitioner ever questioned the impartiality of the jury that found him guilty. Thus, petitioner's only possible claim is that the district court was not justified in questioning Noell in the first instance to determine whether he should be excused. As the court of appeals concluded (*id.* at 4a-5a), however, the district court was plainly justified in questioning Noell because "[t]he information provided by [the prosecutor], based upon [the FBI agent's] report and the records, raised a serious question about Noell's impartiality."¹

2. There is likewise no merit to petitioner's contention (Pet. 14-19) that the court of appeals incorrectly resolved the issue, left open in *Bourjaily v. United States*, No. 85-6725 (June 23, 1987), slip op.

¹ Contrary to petitioner's suggestion (Pet. 8), the court of appeals did not fault the district court for questioning Noell in chambers without counsel present and without a record being made. Although petitioners objected to the district court's ruling that it was necessary to question Noell, petitioner did not request an evidentiary hearing and agreed that the district court could pursue its questioning in chambers (Pet. App. 5a-6a n.3, 17a-18a). For that reason, the court of appeals concluded that the district court did not abuse its discretion in proceeding as it did (*id.* at 5a-6a n.3). The court noted, however, that in the future it would be a "more desirable practice" for district courts to question jurors on the record with counsel present (*ibid.*). Cf. *Smith v. Phillips*, 455 U.S. 209, 215-219 (1982).

9, whether the determination that a conspiracy exists for purposes of admitting a co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E) may be based solely on the co-conspirator's hearsay statements. The court of appeals expressly stated (Pet. App. 11a) that "it is not necessary for us to resolve the matter" because the district court here relied on other non-hearsay and documentary evidence in determining that there was sufficient proof of a vote-buying conspiracy to allow admission of Holt's hearsay statements to the Boughs under Rule 801(d)(2)(E).

Nor is there any merit to petitioner's related assertion (Pet. 15-16) that the court of appeals' ruling nonetheless constitutes "a *de facto* holding that a co-conspirator's statements alone can establish a conspiracy."² As described by the court of appeals (Pet. App. 11a), the evidence at trial showed that petitioner and his co-defendant Clark, who were both candidates in the election, were acting together to purchase absentee ballots and votes. The evidence also showed that Holt, one of petitioner's precinct workers, engaged in the same scheme and purchased absentee ballots from the Boughs, even though he was

² Petitioner mistakenly asserts (Pet. 19 n.6) that the Eighth Circuit in *United States v. Cerone*, 830 F.2d 938 (1987), cert. denied, No. 87-1419 (May 16, 1988), indicated support for the admissibility of hearsay testimony regardless of the lack of independent proof of a conspiracy. The Eighth Circuit in *Cerone*, simply ruled, consistent with *Bourjaily*, that a trial court "may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted" (830 F.2d at 948). The court also "observe[d] that the Government produced direct evidence of the conspiracy and appellants' participation in it" (*id.* at 948 n.10).

not a candidate for any office in the election (see *ibid.*). Both courts below concluded that that evidence, combined with co-defendant Holt's statements to the Boughs that he would be taking their absentee ballots to petitioner, was sufficient to show that Holt was a member of the conspiracy. No further review of petitioner's factbound contention to the contrary is warranted.³

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

³ Any error in admitting Holt's statements under Rule 801(d)(2)(E) would be harmless in any event, because petitioner was acquitted on the conspiracy count, as well as the substantive counts charging him with buying the votes that were the subject of those statements.

